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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/566,141	01/27/2006	Bjorn Ove Dalseide	53550.78	1896

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EXAMINER	
SALONE, BAYAN	

ART UNIT	PAPER NUMBER
3726	

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

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In re Application of:
DALSEIDE, BJORN OVE
Serial No. 10/566,141
Filed: Jan. 27, 2006
Docket: 53550.78
Title: DEVICE OF A DESCALER HEAD

DECISION ON PETITION
UNDER 37 CFR § 1.181

This is a decision on the petition filed on March 30, 2010 under 37 CFR § 1.181. Petitioner requests that the finality of the rejection mailed on September 30, 2009 be withdrawn because petitioner believes the Rule 116 Amendment of October 20, 2009 would overcome the Final Rejection.

The petition is dismissed as moot.

Background

In response to the applicant's arguments responding the non-final Office action filed on July 24, 2009, the examiner issued a Final Rejection on September 30, 2009. On October 20, 2009, the applicant filed a Rule 116 Amendment and traversed the examiner's rejection of the claims. A telephone interview was conducted on October 20, 2009 between the examiner and the applicant's attorney. According to the Interview Summary record mailed on October 22, 2009, there was no agreement reached. However, the contents of the Interview Summary shows the examiners concurred that an amendment further detailing the deformation of the disc-shaped plates and how the descaler portions are longitudinally offset in different planes would appear to define over the rejection of record. Subsequently, on December 7, 2009, the examiner sent an Advisory Action informing the applicant that the Rule 116 Amendment of October 20, 2009 will not be entered because it raised new issues that would require further consideration and /or search. On March 30, 2010, the current petition requesting withdrawal the finality of the Office action of September 30, 2010 was filed because petitioner opines that the Rule 116 Amendment of October 22, 2010 would overcome the Final Rejection of September 30, 2009. On March 30, 2010, the applicant filed a Request for Continued Examination.

Discussion

The present petition filed on March 30, 2010, requests withdrawal of the finality of the Office Action mailed on September 30, 2010 because the Rule 116 Amendment of October 22, 2010 would overcome the Final Rejection. In the petition, petitioner did not point out any impropriety

of the finality of the Final Rejection of September 30, 2009. A review of the Final Rejection of September 30, 2009 does not show any error. Therefore, the finality of the Office action is proper. Since, the entry of Rule 116 Amendment is not a matter of right. The Advisory Action mailed on December 7, 2009 also contains no error.

On March 30, 2010, the applicant also filed a Request for Continuing Examination under 37 CFR §1.114. Therefore, the finality of the Office Action mailed on September 30, 2009 is operatively withdrawn, and the applicant is now able to argue the merits of the examiner's rejections in subsequent amendment as filed on October 20, 2009 (37 CFR § 1.114(d))[1].

With regard to the requested credit of the cost of filing RCE and three months of extension of time, 35 USC § 42(d) permits a refund of "any fee paid by mistake or any amount paid in excess of that required." Thus, the Office may refund: (1) a fee paid when no fee is required (a fee paid by mistake); or (2) any fee paid in excess of the amount of fee that is required. See Ex Parte Grady, 59 USPQ 276, 277 (Comm'r Pats. 1943) (the statutory authorization for the refund of fees is applicable only to a mistake relating to fee payment). However, petitioner has not shown, nor does inspection of the record reveal, that any fees were paid either in excess or by mistake. Since all fees were paid in the proper amounts and purposes, the fees were not paid in excess. It should be noted that the USPTO has no authority to waive fees or provide refund (35 USC 41(a)(8)). Unless petitioner can point out any fees charged were by mistake or in excess, no refund of fees can be made in this application.

Decision

In view that the contested claims are now pending before the examiner, the petitioner's request for relief is moot. Therefore, the petition to withdraw the finality of the September 30, 2009 Office action is dismissed as moot.

Any inquiry regarding this decision should be directed to Henry C. Yuen, Special Programs Examiner, at (571) 272-4856.

PETITION DISMISSED AS MOOT.

Robert Olszewski, Director
Technology Center 3700

[1]37 CFR §1.114(d) states: If an applicant timely files a submission and fee set forth in § 1.17(e), the Office will withdraw the finality of any Office action and the submission will be entered and considered.